6-25-2001

Stoddard v. Hagadone Corp. Appellant's Brief 2 Dckt. 34335

Bentley G. Stromberg
CLEMENTS, BROWN & McNICHOLS, P.A.
Attorneys at Law
Post Office Box 1510
321 13th Street
Lewiston, ID 83501
(208) 743-6538
(208) 746-0753 Facsimile
ISB #3737

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD, Claimant, vs. HAGADONE CORPORATION, Employer, and GENERAL INSURANCE COMPANY OF AMERICA, Surety, and ROYAL INDEMNITY COMPANY, Surety, Defendants.	)	I.C. Nos: 99-016897 96-018310 97-036904 DEFENDANT HAGADONE AND GENERAL INSURANCE COMPANY'S POST-HEARING BRIEF

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2001, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John T. Mitchell
Attorney at Law
408 E. Sherman Avenue, Suite 316
Coeur d' Alene, ID 83814

Glenna Christensen
Moffatt, Thomas, Barrett, Rock &
Fields, Chartered
Post Office Box 829
Boise, ID 83701

__X__ U.S. MAIL
_____ HAND DELIVERED
__X__ OVERNIGHT MAIL
_____ TELECOPY (FAX)

Bentley G. Stromberg

Bentley G. Stromberg
CLEMENTS, BROWN & McNICHOLS, P.A.
Attorneys at Law
Post Office Box 1510
321 13th Street
Lewiston, ID 83501
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DEFENDANT HAGADONE
AND GENERAL INSURANCE
COMPANY'S POST-HEARING
BRIEF

I.

INTRODUCTION

This is a complex case. It involves three industrial injuries, one non-industrial injury, two sureties and starkly contrasting medical opinions. When, however, the case is unwound, one thing is clear: General Insurance Company has paid all of the worker's compensation benefits it owes.

II.

STATEMENT OF ISSUES

The issues are:

1. Whether claimant is entitled to additional medical benefits;

2. Whether claimant is entitled to additional temporary disability benefits;

3. Whether claimant is entitled to additional permanent partial impairment benefits;

4. Whether claimant is totally and permanently disabled under the odd-lot doctrine, and, if so, how the total and permanent disability should be apportioned;

5. Whether claimant has sustained a permanent partial disability in excess of impairment and, if so, how the permanent partial disability should be apportioned; and

6. Attorney fees.

(Tr., pp. 8-11).

III.

THE INJURIES AND SURETIES

On May 5, 1996, claimant sustained a hernia while lifting flower pots from a boat in the course of his employment with his employer, the Hagadone Corporation ("Hagadone") (Tr, p. 57, Ll. 3-19). General Insurance Company ("General") was Hagadone's surety at the time. General accepted liability for the claim.

On July 24, 1997, claimant was rear-ended while he was stopped at a traffic light. (Tr., pp. 76-77). Claimant sustained neck, left shoulder and low back injuries as a consequence of the accident. (Tr., pp. 246-249). The automobile accident was not work-related. Claimant, however, recovered a total of $65,062.40 from the other driver's insurer and his own insurer as a consequence of his injuries. (General's Exhibit E).

On October 10, 1997, claimant sustained a low back injury while putting away concrete flower pots in the course of his employment with Hagadone. (Tr., pp. 89-90). General was still Hagadone's surety and again accepted liability for the claim.

On May 11, 1999, claimant sustained a low back injury when he fell while cutting grass in the course of his employment for Hagadone. (Tr., pp. 101-102). Hagadone's surety at that time was Royal Indemnity Company ("Royal"). Royal accepted liability for the claim.

IV.

MEDICAL HISTORY

A. The May 5, 1996 Hernia.

Claimant's hernia was surgically repaired by Dr. Pennings on February 26, 1997. (Claimant's Exhibit 2, p. 2). Claimant, however, continued to experience hernia-related discomfort, and so on November 14, 1997, a second surgery was performed, this time by Dr. West. During the surgery, Dr. West performed a neurolysis of the iliolingual nerve and removed a piece of Gortex mesh. (Claimant's Exhibit 2, pp. 74-75).

Dr. West declared claimant medically stable as of May 19, 1998. (Claimant's Exhibit 2, p.35). Dr. West also released claimant to return to his pre-injury job – albeit, with a thirty pound lifting restriction. (Claimant's Exhibit 2, p. 19).

Dr. West initially assigned a 5% of the whole person permanent partial impairment rating regarding the hernia. (Claimant's Exhibit 2, p. 35). After General sought clarification of the basis for the rating, Dr. West indicated that the rating was 10 to 19% of the whole person. (Claimant's Exhibit 2, pp. 36-37). On October 17, 1998, after General once again sought clarification, Dr. West assigned a final rating of 10% of the whole person. (Claimant's Exhibit 2, p. 38). General paid the 10% rating in full.

Claimant has not received any hernia-related medical treatment since March 19, 1998. (Claimant's Exhibit 2, pp. 3-4).

B. The July 24, 1997 Auto Accident.

Claimant sustained neck, left shoulder and low back injuries as a consequence of the July 24, 1997 auto accident (Tr., pp.77-78 and 246-249).

Claimant initially sought medical treatment from Dr. West, who prescribed physical therapy. (Claimant's Exhibit 2, p. 1). Claimant underwent physical therapy from July 29, 1997 through October 10, 1997. (Claimant's Exhibit 10, pp. 1-19).

Claimant later sought treatment for his neck and shoulder from Dr. Treolar and Dr. French. (Claimant's Exhibits 1 and 3). Dr. French diagnosed cervical instability and left shoulder instability. (Claimant's Exhibit 3, p. 11). Dr. French recommended that claimant undergo surgery for his left shoulder injury, but clamant declined. (Claimant's Exhibit 3, p. 12 and Tr., p. 240, Ll. 18-25).

On April 12, 1999, Dr. French stated that claimant's left shoulder condition was stable and that claimant had sustained a 20% of the whole person permanent partial impairment regarding his left shoulder. (Claimant's Exhibit 3, p. 27). He also opined that as a consequence of the left shoulder injury, claimant has the following permanent limitations: lifting up to 25 pounds from waist height on an occasional basis; lifting up to 15 pound from waist height on a frequent basis; lifting 10 pounds to shoulder height on an occasional basis; lifting 5 pounds to shoulder height on a frequent basis; lifting 10 pounds above shoulder level on an occasional basis; and lifting 5 pounds above shoulder level on a

frequent basis. (Claimant's Exhibit 3, pp. 27-28).

Claimant testified that he has experienced continual low back pain since the July 24, 1997 auto accident. (Tr., pp. 258-259).

C. The October 10, 1997 Low Back Injury.

On October 10, 1997, claimant felt pain in his low back while putting away concrete flower pots in the course of his employment for Hagadone. (Tr., pp. 89-90).

On the day of the accident, claimant mentioned the injury to the physical therapist who was treating him for his auto accident-related injuries. (Claimant's Exhibit 10, p. 19). Claimant also sought treatment from Dr. West and later from Dr. Treolar, who referred claimant to physical therapy. (Claimant's Exhibit 2, p. 2 and Claimant's Exhibit 1, p. 60). Claimant underwent physical therapy between February 16, 1998 and April 2, 1998. (Claimant's Exhibit 11, pp.25-34).

On or about April 13, 1998, Dr. Trealor concluded that claimant was stable, that he had sustained no impairment as a consequence of the October 10, 1997 low back injury, and that he was capable of returning to work without restrictions. (Claimant's Exhibit 1, p. 18). Dr. Shanks – one of claimant's subsequent treating physicians – agreed with Dr. Treolar's conclusions. (Shanks Depo., p. 34, Ll. 12-23).

On February 2, 2001, claimant was examined by Dr. Sears at the request of General. (General's Exhibit C). Dr. Sears concluded that claimant had sustained low back

pain as a consequence of the October 10, 1997 accident, but that claimant had sustained no permanent impairment (Id.).

D. The May 11, 1999 Low Back Injury.

On May 11, 1999, claimant slipped and fell while cutting the grass in the course of his employment for Hagadone. (Tr., pp. 101 -102). Claimant testified that the May 11, 1999 injury "changed his life" and that "nothing has ever been the same since. My back has hurt so much – and I've been so miserable since then. It's not a good place." (Tr., p. 102, Ll. 14-18).

On May 12, 1999, claimant sought medical treatment from Dr. West, who diagnosed claimant's condition as a lumbar strain. (Claimant's Exhibit 2, p. 4). Claimant later sought treatment from Dr. Shanks who restricted claimant from working and referred claimant for physical therapy. (Claimant's Exhibit 1, pp. 3-4 and 22).

On November 11, 1999, claimant was examined by Dr. Adams, an orthopedic surgeon, at the request of Royal. (General's Exhibit A). Dr. Adams diagnosed claimant's condition as chronic low back pain. (Id.). Dr. Adams also concluded that claimant had sustained no permanent impairment and that he had reached maximum medical improvement. (Id.).

Dr. Shanks disagrees with Dr. Adams. According to Dr. Shanks, claimant has a 10% of the whole person permanent partial impairment regarding his low back, 5% of

If claimant is totally disabled, it is due to the combined effects of the May 5, 1996 hernia, the pre-existing degenerative condition of his low back, the July 24, 1997 auto accident-related back and left upper extremity injuries, and the May 11, 1999 low back injury. According to Dr. West, claimant has a 10% impairment attributable to the hernia. (Claimant's Exhibit 2, p. 38). According to Dr. Shank's, claimant has a 5% impairment attributable to the degenerative condition in claimant's low back. (Shanks Depo., pp. 43-45). According to Dr. French, claimant has a 20% of the whole person impairment rating attributable to the left upper extremity. All of those impairments pre-existed the final work-related injury – i.e., the May 11, 1999 low back injury.

Additionally, those pre-existing impairments did constitute a subjective hindrance or obstacle to employment. According to claimant, the hernia-related symptoms and his low back condition significantly impacted his ability to perform his job with Hagadone. (Tr., p. 63, Ll. 10-22 and General's Exhibit A, pp. 56-57). The left upper extremity impairment significantly affected claimant's ability to engage in his "side" topiary and tree trimming business. (Tr., pp. 252-253). Indeed, Dan Brownell testified that given claimant's upper extremity limitations, he is no longer capable of performing topiary work. (Tr., p. 175, Ll. 12–20).

If, therefore, claimant is totally and permanently disabled, then under Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984) and Smith v. J.B.

Parson, liability must be apportioned between the surety on the last injury – Royal – and the ISIF. The apportionment should be as follows: 1) claimant's impairments total 40%; 2) 5% of that 40% – i.e., 1/8th – is attributable to Royal; 3) 35% of the 40% – i.e., 7/8th's – is attributable to the ISIF; 4) Royal is therefore liable for its 5% plus 1/8th of the remaining 60%; and 5) the ISIF is liable for the remainder of the total and permanent disability.

Claimant asserts that no liability should be apportioned to the ISIF because the ISIF is not a party to this proceeding. It is claimant, however, and not defendants, who is asserting total and permanent disability. It was, therefore, his obligation to join the ISIF. Furthermore, claimant is still free to proceed against the ISIF after the Commission issues its decision in this matter.

If, however, the Commission does not apportion liability to the ISIF, then the fact remains that none of the liability for claimant's alleged total and permanent disability should be apportioned to General. Claimant did sustain a 10% impairment as a consequence of the May 5, 1996 hernia, but he sustained no impairment as a consequence of the October 10, 1997 low back injury. There can be no disability without impairment, and so the October 10, 1997 low back injury cannot be considered in any apportionment calculation.

Additionally, claimant missed no work as a consequence of either the May 5, 1996 hernia or the October 10, 1997 low back injury; claimant's hourly wage for Hagadone increased after those injuries; and Dr. Shanks – claimant's treating doctor – testified that

claimant would have been able to work for Hagadone until retirement but for the May 11, 1999 low back injury. (Tr., pp. 242-243 and Shanks Depo., p. 35, Ll. 19-24).

In short, the May 5, 1996 hernia and the October 10, 1997 low back injury did not cause a decrease in claimant's wage earning capacity. Accordingly, none of clamant's alleged total and permanent disability should be apportioned to General.

E. Permanent Partial Disability in Excess of Impairment.

1. <u>Claimant has sustained no disability in excess of impairment as a consequence of the May 5, 1996 hernia and the October 10, 1997 low back injury.</u>.

As mentioned, claimant missed no work for Hagadone as a consequence of the May 5, 1996 hernia and the October 10, 1997 low back injury. Additionally, his hourly wage actually increased following those injuries. Those injuries, therefore, did not lead to a decrease in claimant's wage earning capacity – and certainly not a decrease in excess of the 10% impairment rating assigned regarding the hernia. There is, therefore, no basis for awarding disability in excess of impairment regarding the injuries for which General has coverage.

F. Attorney Fees.

Claimant is not seeking attorney fees from General Insurance Company regarding the May 5, 1996 hernia or the October 10, 1997 low back injury.

VII.

CONCLUSION

General Insurance Company has paid all of the worker's compensation benefits it owes.

DATED this 25th day of June, 2001.

CLEMENTS, BROWN & McNICHOLS, P.A.

By _____
BENTLEY G. STROMBERG
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2001, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John T. Mitchell
Attorney at Law
408 E. Sherman Avenue, Suite 316
Coeur d' Alene, ID 83814

Glenna Christensen
Moffatt, Thomas, Barrett, Rock &
Fields, Chartered
Post Office Box 829
Boise, ID 83701

__X__ U.S. MAIL
_____ HAND DELIVERED
__X__ OVERNIGHT MAIL
_____ TELECOPY (FAX)

Bentley G. Stromberg

COPY

Kenneth L. Mallea
MALLEA LAW OFFICES
1406 East First, Suite 207
P.O. Box 857
Meridian, ID 83680
Telephone: (208) 888-2790
Fax: (208) 888-2789
Idaho State Bar No. 2397

Attorney for Defendant State of Idaho
Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD, Claimant, vs. THE HAGADONE CORPORATION, Employer, and ROYAL INDEMNITY COMPANY, aka ROYAL and SUNALLIANCE, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. NO. 99-016897 PETITION FOR DECLARATORY RULING

COMES NOW DEFENDANT, State of Idaho, Industrial Special Indemnity Fund ("ISIF"), by and through its counsel of record, Kenneth L. Mallea, of the firm Mallea Law

Offices, and petitions the Industrial Commission ("Commission") for a declaratory ruling, pursuant to Rule XV of the Judicial Rules of Practice and Procedure under the Worker's Compensation Act. ISIF represents that:

1. The ruling sought is within the jurisdiction of the Commission to determine in that it arises under the Commission's Findings of Fact, Conclusions of Law dated September 7, 2001, and the Commission's Order Regarding Reconsideration, dated December 14, 2001. The following issues are raised which need to be addressed:

A) Whether the Commission should dismiss the complaint against ISIF because that action is barred by the doctrine of collateral estoppel;

B) Whether the Commission should dismiss the complaint against ISIF because the Employer/Surety waived its right to seek apportionment from ISIF;

C) Whether the Commission's decision bars the Employer/Surety's complaint pursuant to I.C. § 72-718;

D) Whether Surety waived its right to seek apportionment from ISIF or should be estopped from seeking such apportionment;

E) Whether ISIF's constitutional due process rights will be denied if Employer/Surety is allowed to proceed against ISIF; and,

F) Whether the Employer/Surety's complaint should be dismissed as a matter of law because Employer/Surety cannot establish the requisite elements set forth in I.C. § 72-332 for ISIF liability.

2. An actual controversy exists as to these matters by virtue of the complaint Employer/Surety has now filed against ISIF seeking apportionment for an award

entered against Surety in the Commission's previous decision.

3. ISIF has an interest in the matter and issues raised by virtue of its potential liability for apportionment should the Commission allow Employer/Surety's complaint to proceed.

4. A memorandum in support of this Petition is filed contemporaneously herewith citing the law and facts upon which this Petition is based.

5. Service of this Petition has been made on all parties to the above-entitled action.

DATED This 2nd day of October, 2002.

MALLEA LAW OFFICES

Kenneth L. Mallea
Attorney for Defendant/ISIF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2002, a true and correct copy of the within and foregoing document was served upon:

Robert Stoddard
c/o Thomas Mitchell
Attorney at Law
1448 Arbor
Rathdrum, ID 83858

Glenna M. Christensen
MOFFATT THOMAS
P.O. Box 829
Boise, ID 83701-0829

__XX__ by U.S. mail
_____ by hand delivery
_____ by facsimile
_____ by overnight mail

Kenneth L. Mallea

COPY

Kenneth L. Mallea
MALLEA LAW OFFICES
1406 East First, Suite 207
P.O. Box 857
Meridian, ID 83680
Telephone: (208) 888-2790
Fax: (208) 888-2789
Idaho State Bar No. 2397

Attorney for Defendant State of Idaho
Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD, Claimant, vs. THE HAGADONE CORPORATION, Employer, and ROYAL INDEMNITY COMPANY, aka ROYAL and SUNALLIANCE, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. NO. 99-016897 MEMORANDUM IN SUPPORT OF PETITION FOR DECLARATORY RULING

COMES NOW DEFENDANT, State of Idaho, Industrial Special Indemnity Fund ("ISIF"), by and through its counsel of record, Kenneth L. Mallea, of the firm Mallea Law

Offices, and submits the following Memorandum in Support of its Petition for Declaratory Ruling. For purposes of ISIF's Petition for Declaratory Ruling, the Petition and this Memorandum is based on the files, records and pleadings in Industrial Commission Case Nos. 96-018310, 97-036904, and 99-016897. ISIF specifically reserves the right, however, to challenge the evidence, findings and conclusions in those cases if the Commission does not dismiss The Hagadone Corporation's and Royal Indemnity Company's (collectively referred to here in "Surety") complaint pursuant to ISIF's Petition for Declaratory Ruling.

I. STATEMENT OF FACTS

Claimant filed a complaint against Surety on April 17, 2000. The facts of that underlying action are set forth in the Commission's Findings of Fact, Conclusions of Law and Recommendation, ¶¶ 1-45, dated September 7, 2001. That litigation occurred in Industrial Commission case numbers 96-018310, 97-036904, and 99-016897. Neither Claimant nor Surety joined ISIF in that action. Neither Claimant nor Surety filed a complaint against ISIF in that prior action. ISIF was not a party to that proceeding.

After extensive discovery and preparation by the parties, Referee Michael E. Powers heard the matter on March 14, 2001. One of the issues listed by the parties which was expressly before the referee was whether Claimant was entitled to permanent and total disability benefits. March 14, 2001, Hearing Transcript ("Tr."), p. 10, LL. 5-10. The Commission's September 7, 2001, decision, Issue #4 states, "Whether, and to what extent, Claimant is entitled to permanent partial disability (PPD)

benefits, **including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine;**". (emphasis added).

Claimant contended throughout the prior proceedings that he was permanently and totally disabled. September 7, 2001 Recommendation, Contention of Parties, ¶ 1. Evidence regarding Claimant's pre-existing degenerative disc disease was introduced at the hearing, as well as evidence regarding Claimant's accident/injuries which occurred prior to the May 11, 1999 injury which occurred while Claimant was employed with The Hagadone Corporation. Findings of Fact, ¶¶ 2–11.

The Commission found that Claimant was permanently and totally disabled pursuant to the odd-lot doctrine. Findings of Fact, ¶¶ 40–43; Conclusions of Law, ¶ 5. The Surety introduced evidence from its retained certified rehabilitation counselor, Daniel R. McKinney, in an effort to rebut Claimant's contention that he was permanently and totally disabled pursuant to the odd lot doctrine. The Surety introduced Mr. McKinney's testimony in an effort to rebut the argument that Claimant was unemployable absent a sympathetic employer. September 7, 2001 decision, ¶¶ 34-36.

On December 14, 2001, the Commission filed its Order Regarding Reconsideration. In that Order, p. 2, the Commission stated in pertinent part,

> ... **Claimant experienced four accidents that eventually rendered Claimant totally and permanently disabled under the odd-lot doctrine. . . ISIF was never included as a party to these proceedings.**
>
> ... The Commission is unaware of any guidance for determining a percentage only for Employer's liability in total and permanent disability cases with pre-existing impairment and/or disability.
>
> **Under the facts of this case, the Commission has determined that the last accident caused Claimant to suffer total and permanent disability. No other**

facts or circumstances have been presented to the Commission. Accordingly, the Commission finds that Royal should be fully liable for total and permanent disability benefits. (emphasis added).

Amending its September 7, 2001, decision the Commission stated that the Surety was liable for Claimant's total and permanent disability pursuant to the odd-lot doctrine and was liable for all such benefits owing to Claimant. Order Regarding Reconsideration, ¶¶ 2 and 4.

The Surety did not appeal either the September 7, 2001, or the December 14, 2001, Commission decisions. Over five (5) months later, on May 22, 2002, the Surety filed a complaint against ISIF, seeking apportionment from ISIF for part of the award the Commission ordered it to pay Claimant. On June 4, 2002, ISIF answered the Surety's complaint, alleging a number of affirmative defenses.

II. ARGUMENT

A. SURETY'S COMPLAINT AGAINST ISIF IS BARRED PURSUANT TO THE DOCTRINE OF COLLATERAL ESTOPPEL.

Jackman v. Industrial Special Indem. Fund, 129 Idaho 689, 931 P.2d 1207 (1997) is on point with the instant case and supports the conclusion that the Surety is barred from pursuing ISIF for apportionment pursuant to the doctrine of collateral estoppel. In *Jackman*, claimant settled his claims against the employer/surety pursuant to a lump sum agreement on February 8, 1990. On February 20, 1990, the Commission entered an order approving the agreement and discharging the employer/surety of all liability relating to claimant's accident. On January 25, 1994, claimant filed an application requesting a hearing for compensation and award against the ISIF. *Id.* at 690. As in the instant case, the ISIF in *Jackman* was not a party to

proceeding which resulted in a final award between the claimant and the employer/surety. The Court in *Jackman* applied the doctrine of collateral estoppel and precluded Jackman's claim against the ISIF.

The Court stated,

> **ISIF argues that Jackman's claim against ISIF is collaterally estopped. We agree.**
>
> In *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 849 P.2d 107 (1993), **this Court set forth the appropriate test for determining whether collateral estoppel, (issue preclusion), will prevent the relitigation of issues actually decided in a prior case:**
>
> **(1) Did the party "against whom the earlier decision is asserted ... have a 'full and fair opportunity to litigate that issue in the earlier case?'" (2) Was the issue decided in the prior litigation "identical with the one presented in the action in question?" (3) Was the issue actually decided in the prior litigation? This may be dependent on whether deciding the issue was "necessary to [the prior] judgment." (4) "Was there a final judgment on the merits?" (5) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?".** *Magic Valley Radiology, P.A.*, 123 Idaho at 439, 849 P.2d at 112.
>
> Jackman contends that in his previous case against [employer/surety] he was deprived of a full and fair opportunity to litigate the issue of apportionment pursuant to I.C. Section 72-332. Jackman's present claim against ISIF for apportionment is tied to the same impairment rating Jackman relied upon in his claim against [employer/surety]: 33% whole person impairment. Jackman had a fair opportunity and incentive to vigorously litigate his whole person impairment rating in Jackman's case against [employer/surety].
>
> Jackman argues the doctrine of collateral estoppel should not be applied in this case since the issue in the present case is distinguishable from the issue raised in Jackman's action against [employer/surety].
>
> Jackman contends that the issue in Jackman's case against SIF was the total value of Jackman's claim against SIF and that the apportioning of benefits between ISIF and SIF was never addressed in the Agreement. . . .
>
> . . . Jackman cannot rely upon the same percentage impairment rating in order to attain further benefits from ISIF. Jackman must present additional

evidence of impairment in order to increase his impairment rating. **The issue presented in the proceeding against [employer/surety], compensating Jackman for his impairment rating of 33% whole person, is identical to the issue Jackman presently raises: whether ISIF must compensate Jackman for a portion of the same 33% whole person impairment.**

In order for the doctrine of collateral estoppel to apply, there must be final judgment on the merits. On February 20, 1990, the commission approved the Agreement, including the 33% whole person impairment rating, pursuant to I.C. Section 72-404. . . . The Commission's February 20, 1990 order, approving the Agreement pursuant to I.C. Section 72-404, was a final judgment on the merits.

Despite the fact that ISIF was not a party to Jackman's Agreement with [employer/surety], ISIF may still assert the doctrine of collateral estoppel in the present case. Jackman was a party to the prior action against [employer/surety] and is the party against whom the plea of collateral estoppel has been asserted. . . . (citation omitted) (emphasis added).

Id. at 691-692.

As Jackman argued, Surety will likely argue that apportionment to the ISIF was not an issue in the prior action and therefore collateral estoppel should not apply. As in *Jackman*, however, the Surety was a party to the prior action and is the party against whom ISIF asserts the plea of collateral estoppel. Surety vigorously contested Claimant's allegation that he was permanently and totally disabled pursuant to the odd lot doctrine. Surety cannot argue that it did not know that Claimant was claiming he was totally and permanently disabled. The record below is replete with evidence regarding Claimant's pre-existing conditions/injuries. Surety had a full and fair opportunity to litigate the effect of those injuries on Claimant and the allegation that he was permanently and totally disabled. Surety took advantage of that opportunity by introducing expert testimony designed to rebut the Claimant's argument that he was totally disabled pursuant to the odd-lot doctrine.

Surety also had a full and fair opportunity to join ISIF in the prior proceeding and argue that ISIF was liable for a portion of Claimant's benefits. Surety failed to join ISIF in that proceeding. As in *Jackman*, Surety in this case is seeking to raise the identical issue already decided in the prior action – whether ISIF must pay a portion of Claimant's benefits which the prior decision determined Claimant was entitled to receive and which Surety was responsible for paying. The Commission already found that,

> Claimant experienced four accidents that eventually rendered Claimant totally and permanently disabled under the odd-lot doctrine. . . . ISIF was never included as a party to these proceedings. . . . Under the facts of this case, the last accident caused Claimant to suffer total and permanent disability. No other facts or circumstances have been presented to the Commission. Accordingly, the Commission finds that Royal should be fully liable for total and permanent disability benefits.

Order Regarding Reconsideration, p. 2.

Surety never appealed the Commission's final judgment. Instead, it chose to wait five months and then file a separate action against ISIF seeking to relitigate the very issue that the Commission had already decided -- liability for Claimant's disability benefits. ISIF anticipates that Surety will try to rely on the very same evidence and determinations made in the prior action to argue that ISIF should be liable for a portion of Claimant's benefits. That is exactly what the doctrine of collateral estoppel was designed to prohibit. All of the elements of collateral estoppel are met in this case. The Commission should dismiss with prejudice Surety's complaint against ISIF pursuant to the doctrine of collateral estoppel.

B. THE COMMISSION'S PRIOR, FINAL DECISION BARS SURETY'S COMPLAINT AGAINST ISIF PURSUANT TO I.C. § 72-718.

I.C. § 72-718 states in pertinent part that, "A decision of the commission, in the

absence of fraud, **shall be final and conclusive as to all matters adjudicated by the commission** upon filing the decision in the office of the commission. . ." The Commission's September 7, 2001, Findings and Conclusions and its December 14, 2001, Order Regarding Reconsideration are final and conclusive as to all matters adjudicated therein. Surety failed to appeal either of those decisions. Surety has made no allegation that the Commission's prior decision was tainted by fraud.

The Commission adjudicated whether Claimant was totally and permanently disabled in the prior action. Claimant raised that as an issue before the hearing officer and evidence was presented on his prior injuries/accidents. Claimant argued that he was totally and permanently disabled pursuant to the odd-lot doctrine and Surety presented evidence in an attempt to rebut that argument. The Commission found that Claimant was totally and permanently disabled pursuant to the odd-lot doctrine. The Commission then concluded,

> Claimant experienced four accidents that eventually rendered Claimant totally and permanently disabled under the odd-lot doctrine. . . . ISIF was never included as a party to these proceedings. . . . **Under the facts of this case, the last accident caused Claimant to suffer total and permanent disability.** No other facts or circumstances have been presented to the Commission. Accordingly, the Commission finds that **Royal should be fully liable for total and permanent disability benefits.** (emphasis added).

Order Regarding Reconsideration, p. 2.

Surety's current complaint against ISIF seeks apportionment of Claimant's disability benefit award. In other words, Surety seeks to be relieved of a portion of its responsibility regarding Claimant's benefits -- a responsibility the Commission has already decided belongs solely with Surety. The Commission already decided that the

last accident caused Claimant to suffer total and permanent disability. Yet Surety's current complaint against ISIF requests apportionment, which necessary would contravene the Commission's prior decision that Surety was solely liable for Claimant's total and permanent disability; Surety's new position that ISIF is liable for some portion of Claimant's benefit payments is contrary to the Commission's previous final and conclusive determination that Surety "should be fully liable for [Claimant's] total and permanent disability benefits."

The Commission's prior decision in this case bars Surety's current complaint against ISIF. *See also, Whittaker v. Cecil,* 69 S.W.3d 69 (Ky 2002) (Compensation board's final award and employer's failure to raise apportionment argument against special fund on reconsideration or on appeal barred employer's subsequent action against special fund.). The Commission should hold that its prior decision in this matter bars Surety's current complaint against ISIF. The Commission should dismiss that complaint with prejudice.

C. SURETY WAIVED ITS RIGHT TO APPORTIONMENT FROM ISIF BY FAILING TO JOIN ISIF IN THE PRIOR ACTION. THE COMMISSION SHOULD ESTOP SURETY FROM CLAIMING APPORTIONMENT FROM ISIF IN THIS SUBSEQUENT PROCEEDING.

It is undisputed that Surety never joined ISIF in the prior proceeding and never raised the issue of ISIF's liability for apportionment in that prior action. Surety had notice that an issue of potential ISIF apportionment may apply and had plenty of opportunity to join ISIF in the prior action. The Commission expressly noted the fact that ISIF was never included as a party in the proceeding and also commented on the lack of guidance in Idaho case law for determining a percentage only for Employer's

liability in a total and permanent disability case with pre-existing impairment and/or disability. Order Regarding Reconsideration, p. 2. Yet Surety failed to take any action to make ISIF a party to the prior action. Surety's failure in this regard constitutes a waiver of its right to seek apportionment from ISIF in this subsequent proceeding. The Commission should also estop Surety from seeking apportionment from ISIF now, well after the Commission's prior decision has become final and binding.

WAIVER:

Waiver is a voluntary, intentional relinquishment of a known right or advantage. *Brand S Corp. v. King*, 102 Idaho 731, 734, 639 P.2d 432 (1981). "Waiver arising out of conduct is in the nature of estoppel." *Idaho Bank of Commerce v. Chastain*, 86 Idaho 146, 383 P.2d 849 (1963). Surety cannot credibly deny that it was not fully aware that Claimant was alleging total and permanent disability from the very beginning of the prior action. That issue was listed as one to be litigated at the hearing and listed in the referee's Recommendation. Surety cannot deny that extensive evidence was introduced on Claimant's pre-existing conditions. Surety cannot deny that it spent time preparing to rebut that evidence by the introduction of its own expert testimony. Surety litigated with vigor Claimant's assertion that he was totally and permanently disabled under the odd-lot doctrine. Yet Surety did not join ISIF in the prior proceeding. Under these facts, the Commission should conclude that Surety waived its right to seek apportionment from ISIF.

ESTOPPEL:

In the alternative, the Commission should conclude that Surety's should be

estopped from seeking apportionment from ISIF.

> . . .**The doctrine of quasi-estoppel has its basis in acceptance of benefits; it precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced** or of which he accepted a benefit. *KTVB, Inc. v. Boise City,* 94 Idaho 279, 281, 486 P.2d 992, 994 (1971). **The act of the party against whom the estoppel is sought must have** gained some advantage to himself **or produced some disadvantage to another**; or the person invoking the estoppel must have been induced to change his position. *Id.,* 94 Idaho at 281, 486 P.2d at 994 (citations omitted). (emphasis added).

The doctrine of quasi-estoppel does not require a false representation. It is designed to prevent a party from imposing an unconscionable disadvantage upon another, by changing positions. *Young v. Idaho Department of Law Enforcement, Alcohol Beverage Control Division*, 123 Idaho 870, 875, 853 P.2d 615 (Ct.App. 1993). "The doctrine of quasi-estoppel may be invoked against a person asserting a right inconsistent with a position previously taken by him, with knowledge of the facts and his rights, to the detriment of the person seeking to apply the doctrine." (citation omitted). *Young,* 123 Idaho at 875.

Surety's complaint for apportionment against ISIF asserts a position that is inconsistent with the position previously taken by Surety in the prior action with Claimant. Surety had knowledge of facts regarding Claimant's assertion of total and permanent disability and facts relating to his pre-existing impairments. Surety certainly is held to know its rights in these circumstances, as it was represented at all times by competent and experienced counsel. A mistake of law does not entitle Surety to relief as there is no showing in the record of overreaching or unconscionable conduct which

might have justified Surety's failure to join ISIF in the prior proceeding. *See e.g., Rivera v. Johnston*, 71 Idaho 70, 79, 225 P.2d 858 (1950).

Surety acquiesced, throughout the prior proceeding with Claimant, with the position that apportionment to ISIF was not appropriate. Surety failed to join ISIF or contend that any portion of Claimant's award was ISIF's responsibility in the prior action. All of this worked to the detriment of ISIF, because Surety is now trying to use the Commission's prior findings of fact and conclusions of law to impose apportionment against ISIF. Under the circumstances of this case, the Commission should estop Surety's from seeking apportionment from ISIF and dismiss Surety's complaint.

D. ALLOWING SURETY TO PROCEED IN ITS COMPLAINT AGAINST ISIF WOULD BE A DENIAL OF ISIF'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

Surety seeks to use the Commission's prior decision that Claimant is totally and permanently disabled pursuant to the odd-lot doctrine as well as the evidence admitted in that prior decision regarding Claimant's pre-existing conditions as the basis for its argument that ISIF is liable for a portion of Claimant's benefit payments. ISIF was not, however, a party to the prior action. ISIF never had the opportunity to litigate any of the myriad issues relating to ISIF liability, such as whether Claimant had a pre-existing physical impairment, whether that impairment was manifest, whether the impairment was a subjective hindrance and whether the alleged impairment combined with or was aggravated by the industrial injury in causing total disability. All of these elements are necessary in order to establish ISIF liability. *See Garcia v. J.R. Simplot*, 115 Idaho 966, 772 P.2d 173 (1989).

State and federal constitutional rights to procedural due process require that ISIF receive adequate notice and a meaningful opportunity to be heard on an issue that affects its property interests. *See e.g., Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006 (2001). ISIF's property interests are directly affected by Surety's complaint which claims that ISIF is liable for paying a portion of Claimant's disability benefits.

Yet Surety never joined ISIF in the prior action. ISIF never had any notice of that action until it was served with the instant complaint. ISIF was deprived of any opportunity, much less a meaningful opportunity, to be heard on the issue of whether Claimant is totally and permanently disabled. No party in the prior action represented ISIF's interests in litigating that issue. Allowing Surety to proceed against ISIF and rely on the Commission's prior factual findings and conclusions of law would unfairly prejudice ISIF. In that circumstance, ISIF would have been deprived of any opportunity to defend itself against the apportionment claim.

Allowing Surety's complaint to go forward against ISIF is not a viable alternative at this point. ISIF is entitled to a meaningful opportunity to be heard on all of these issues. That would mean re-litigating many of the issues already litigated in the prior action, such as evidence of Claimant's alleged pre-existing impairments and whether Claimant is totally and permanently disabled. Re-litigating these issues runs contrary to the doctrine of collateral estoppel and I.C. § 72-718, as discussed above. It would also allow for inconsistent results in Commission proceedings, something the doctrine of collateral estoppel is designed to prevent.

Nor would ISIF be the only party prejudiced by Surety's new found desire to pursue ISIF apportionment. Claimant would suffer unfairly as well. Claimant has already proved his case against Surety and been awarded total and permanent disability benefits. One of the main concerns of the legislature in adopting the Workers' Compensation Act is that claimants receive compensation due in a timely manner. That goal is met here. The Commission has already decided that Surety is fully responsible for paying Claimant's total and permanent disability benefits. Surety's misguided effort to apportion some of those benefit payments to ISIF in this subsequent proceeding would force Claimant to expend the time and resources to re-litigate his claim of total and permanent disability, undermining the primary purposes of the Act.

E. THE SURETY CANNOT ESTABLISH A PRIMA FACIE CASE UNDER I.C. § 72-332. THIS FAILURE SUPPORTS THE DISMISSAL OF SURETY'S COMPLAINT AS A MATTER OF LAW.

I.C. § 72-332 addresses the conditions under which ISIF may have liability for a claimant's compensation benefits. Subsection (1) of that statute requires that the claimant must have a permanent physical impairment, incur a subsequent disability by injury or occupational disease arising from his employment, "and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment" suffer total and permanent disability. If Surety cannot prove facts establishing those prima facie elements, it has no claim for apportionment against ISIF. Surety cannot prove such facts in this case.

The Commission held that, "Under the facts of this case, the Commission has determined that **the last accident caused Claimant to suffer total and permanent disability.**" (emphasis added). Order Regarding Reconsideration, p. 2. This finding precludes any argument that any alleged pre-existing impairment "combined with" his last accident to render Claimant totally and permanently disabled. Surety cannot, without attempting to re-litigate an issue it has already litigated, prove the elements

necessary to establish ISIF liability under I.C. § 72-332. As discussed above, Surety is precluded from re-litigating matters that the Commission has already adjudicated in the prior action. The Commission should hold as a matter of law that Surety cannot establish a prima facie case of ISIF liability under the mandatory provisions of I.C. § 72-332. Surety's failure in this regard justifies dismissal of its complaint with prejudice.

The basis for ISIF liability under I.C. § 72-332(1) is that the claimant is owed additional income benefits, over and above the compensation benefits for which the employer and surety are liable. The Commission's prior decision in this case makes clear, however, that no additional income benefits are owing to Claimant. Surety has been determined to be "fully liable for total and permanent disability benefits." Again, Surety cannot make out a case under I.C. § 72-332 for ISIF liability.

Finally, I.C. § 72-332 does not provide Surety a basis to seek indemnity or contribution for liabilities the Commission has determined are Surety's responsibility. That is the crux of Surety's complaint against ISIF – that Surety is entitled to indemnity or contribution from ISIF. ISIF is unaware of any legal basis for Surety's indemnity or contribution claim against ISIF under the facts of this case.

III. CONCLUSION

For all the foregoing reasons, ISIF respectfully requests that the Commission issue a declaratory ruling in accordance with the arguments set forth above and dismiss with prejudice the Surety's complaint against ISIF.

DATED this 2nd day of October, 2002.

MALLEA LAW OFFICES

Kenneth L. Mallea
Attorney for Defendant/ISIF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of October, 2002, a true and correct copy of the within and foregoing document was served upon:

Robert Stoddard
c/o Thomas Mitchell
408 East Sherman Ave., Ste 316
Coeur d'Alene, ID 83814-2778

Glenna M. Christensen
MOFFATT THOMAS
P.O. Box 829
Boise, ID 83701-0829

__XX__ by U.S. mail
_____ by hand delivery
_____ by facsimile
_____ by overnight mail

Kenneth L. Mallea

COPY

Kenneth L. Mallea
MALLEA LAW OFFICES
1406 Main Street, Suite 207
P.O. Box 857
Meridian, ID 83680
Telephone: (208) 888-2790
Fax: (208) 888-2789
Idaho State Bar No. 2397

Attorney for Defendant State of Idaho
Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD, Claimant, vs. THE HAGADONE CORPORATION, Employer, and ROYAL INDEMNITY COMPANY, aka ROYAL and SUNALLIANCE, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. NO. 99-016897 **MEMORANDUM IN RESPONSE TO EMPLOYER/SURETY'S MEMORANDUM IN OPPOSITION TO PETITION FOR DECLARATORY RELIEF**

COMES NOW DEFENDANT, State of Idaho, Industrial Special Indemnity Fund ("ISIF"), by and through its counsel of record, Kenneth L. Mallea, of the firm Mallea Law Offices, and submits the following Memorandum in Response to The Hagadone Corporation and

Royal Indemnity Company's (collectively referred to herein as "Surety") Memorandum in Opposition to ISIF's Petition for Declaratory Ruling.

I. ARGUMENT

A. SURETY CONSISTENTLY IGNORES THE FACT THAT THE COMMISSION HAS ALREADY MADE THE FACTUAL FINDING THAT THE CLAIMANT'S LAST ACCIDENT CAUSED CLAIMANT TO SUFFER TOTAL AND PERMANENT DISABILITY. THE COMMISSION CANNOT IMPOSE LIABILITY ON THE ISIF IN A SUBSEQUENT PROCEEDING WITHOUT CONTRADICTING ITS PRIOR DECISION. THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES RE-LITIGATING ISSUES DECIDED IN THE PRIOR PROCEEDING

Surety argues that it does not assert that the Commission's prior decision or findings are binding upon the ISIF. Surety argues that the purpose of its complaint is to determine whether claimant is totally disabled, and if so, whether ISIF is liable for any portion of the payments owing for that total and permanent disability. Defendants Employer/Surety's Memorandum in Opposition to Petition for Declaratory Relief ("Surety's Oppos. Memo"), p. 6-7. The Surety's argument is without merit.

1. Surety Ignores The Commission's Prior Factual Finding That Claimant's Last Accident Caused Claimant To Suffer Total And Permanent Disability.

The Surety consistently ignores that the Commission has already rendered a factual finding that entirely precludes the Surety's admitted purpose in filing its complaint against the ISIF. The Commission held that, "[u]nder the facts of this case, **the Commission has determined that the last accident caused Claimant to suffer total and permanent disability.**" (emphasis added). Order Regarding Reconsideration, p. 2. Yet Surety insists it should be provided another opportunity to litigate that very issue. Surety is suing the ISIF for one purpose only – to convince this Commission that the ISIF is liable for some portion of the benefits which this Commission has already determined Claimant is entitled. Yet in order to realize that goal, Surety must convince the Commission to reverse its prior factual finding that

Claimant's last accident did not cause Claimant to suffer total and permanent disability because that last accident combined with some other pre-existing condition.

Surety is essentially inviting the Commission to reverse a factual finding via this subsequent proceeding against the ISIF. The Commission must reject Surety's invitation in this regard. Surety's remedy was to either join the ISIF in the original proceeding or appeal the Commission's decision that the last accident caused Claimant's total and permanent disability. It did neither and is not allowed at this point to try to cure that omission. The Surety is stuck with its tactical decision in the prior litigation. The Commission should dismiss the instant complaint with prejudice.

2. The Doctrine Of Collateral Estoppel Bars Surety's Complaint Against The ISIF.

Surety misapplies the doctrine of collateral estoppel. Surety argues that collateral estoppel does not apply because the ISIF is not bound by the prior decision and the ISIF is free to contest the Commission's prior factual findings and conclusions of law. Surety's Oppos. Memo, p. 7-8. Surety misapplies the doctrine of collateral estoppel because it is not the ISIF that should be estopped in this case, it is Surety. Surety is the party bound by the doctrine of collateral estoppel because Surety was a party to the prior proceeding in which Claimant was determined to be totally and permanently disabled as a result of his last accident which occurred while he was employed at Hagadone Corporation.

Surety admits that in order to prove ISIF liability under I.C. § 72-332 in this subsequent action, it must prove that Claimant's pre-existing conditions combined with his last industrial accident to render him totally and permanently disabled. Surety's Oppos. Memo, p. 6. Yet the Commission, as discussed above, has already held that the Claimant's last accident caused him to suffer total and permanent disability. The only way for the Commission to hold otherwise is if Surety is allowed to introduce evidence and reargue that issue in this subsequent proceeding. Surety's position that the ISIF is liable for a portion of Claimant's award necessarily requires a

factual finding which is fundamentally inconsistent with the Commission's prior factual finding on this very issue. Surety is seeking another opportunity to litigate the cause of Claimant's disability and seeks to have the Commission render a decision that is in conflict with its prior ruling.

The doctrine of collateral estoppel is designed to avoid the re-litigation of issues already decided, where the party had a full and fair opportunity to litigate the issue. *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 849 P.2d 107 (1993). Surety had its chance to argue that Claimant's pre-existing conditions combined with his last accident as the cause of his total and permanent disability, but for whatever reason, chose not to do so. Surety is not entitled to another opportunity at this stage of the proceedings to make that argument, where it failed to join the ISIF and failed to appeal the Commission's ruling. It would defeat all of the purposes of collateral estoppel for the Commission to allow Surety to proceed in this subsequent proceeding against the ISIF. The Commission must collaterally estop Surety from making that argument now by dismissing Surety's complaint. Moreover, the Commission has already had the hearing in this case and entered its findings and conclusions determining that Claimant is totally and permanently disabled and that Surety is liable for his benefits. Surety is asking the Commission to hold **another evidentiary hearing** on issues already heard and decided. Such an approach , if sanctioned, only increases the burden of the Commission in all cases of potential total disability. The Surety's attempt to escape its strategic and tactical handling of the case must be rejected.

3. Claimant's Interests Require That The Commission Dismiss Surety's Complaint.

Surety's complaint also places Claimant in an untenable position, unfairly prejudicing his interests. Surety argues that,

> ...the prior Industrial Commission determination is not binding and ISIF has the opportunity to submit its own evidence on the issues, to retain a vocational consultant to produce testimony as to the claimant's employability and to conduct such further investigation as it chooses.

Surety's Oppos. Memo, p. 8. The investigation and litigation Surety contemplates would allow the ISIF to subject Claimant to independent medical examinations as well as additional depositions and hearings. These proceedings would all be aimed at establishing that Claimant is not permanently and totally disabled or that his prior impairment(s) did not combine with his last accident to cause total and permanent disability. The very purpose of this litigation attempts to undercut a decision this Commission has already rendered – that Claimant is totally and permanently disabled and that this disability was caused by his last accident.

Yet Surety argues that "[a]llowing litigation of these issues as it pertains to these two parties would in no way affect the benefits of the claimant nor the prior decision as it pertains to him." Surety's Oppos. Memo, p. 8. This conclusion is simply wrong. Subjecting Claimant to more litigation regarding issues relating to his totally and permanent disability would subject Claimant to more time and expense. Surety does not propose paying for Claimant's costs and attorney's fees when Claimant is forced to re-litigate once again what Claimant has already litigated in the prior proceeding. Claimant has already established that he is entitled to certain benefits. If the Commission held in this subsequent action that Claimant was not totally and permanently disabled, the Claimant's entitlement to total and permanent disability benefits would be uncertain at best. The Commission would then be faced with two conflicting decisions – again – exactly the type of scenario the doctrine of collateral estoppel is designed to prohibit.

Surety's complaint against the ISIF is exactly the type of litigation which the doctrine of collateral estoppel precludes. To argue that Claimant would not be adversely affected by this subsequent proceeding simply ignores the realities of what Surety is proposing. The overriding policy of the Worker's Compensation Act is to provide sure and certain relief for Idaho's injured worker's. Allowing Surety's complaint against the ISIF to proceed would be contrary to that purpose.

4. The Current System Works. Surety Simply Failed To Properly Avail Itself Of The Proper Procedures.

Joinder of the ISIF in cases where total and permanent disability is alleged does not create the problems that Surety suggests. Surety's Oppos. Memo, p. 9. The Commission is well aware that the employer/surety's typical practice is to join the ISIF if it appears, at any stage of the proceeding, that a claimant may have a viable argument that he or she is totally and permanently disabled as a result of pre-existing impairments and the industrial accident. This practice occurs despite the fact that the employer/surety might be and in most cases is actually joining with the Fund in contesting the claimant's total and permanent disability claim. Surety's failure to engage in that practice in this case is an unusual yet entirely voluntary exception to the normal practice of the worker's compensation bar.

Surety's newly proposed manner in which to handle litigation of the ISIF's potential liability under I.C. § 72-332 would upset a system that currently works and would have unintended negative consequences. For example, employers/sureties may actually benefit in a case where there may be a pre-existing physical impairment if the Commission finds that a claimant is totally and permanently disabled. By not joining the ISIF in the original action, employers/sureties could give token resistance to a claimant's assertions regarding disability and then bring a subsequent action arguing for contribution from the ISIF. That practice is untenable and unfair to the ISIF and claimants, for all of the reasons set forth in this Memorandum as well as in the ISIF's Memorandum in Support of Petition for Declaratory Relief.

If the Commission rules against ISIF's Petition for Declaratory Relief and allows Surety's complaint to proceed, it would place Claimant's total and permanent disability at issue once again, requiring a hearing on that issue. The Commission's prior finding that Claimant is totally and permanently disabled, and that the cause of that disability was his last accident, conclusively precludes re-litigation of that issue.

Surety failed to address the ISIF's arguments that I.C. § 72-718 barred its complaint and that it could not establish a prima facie case against the ISIF pursuant to I.C. § 72-332. *See*

ISIF's Memorandum in Support of Petition for Declaratory Ruling, Argument, Parts B and E. Surety's failure to address these arguments in its Opposition Memorandum is an implicit admission as to the validity and persuasiveness of those arguments.

II. CONCLUSION

For all the foregoing reasons, and the reasons set forth in its Memorandum in Support of Petition for Declaratory Relief, ISIF respectfully requests that the Commission dismiss with prejudice the Surety's complaint.

DATED This 8th day of November, 2002.

MALLEA LAW OFFICES

Kenneth L. Mallea
Attorney for Defendant/ISIF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of November, 2002, a true and correct copy of the within and foregoing document was served upon:

Robert Stoddard
c/o Thomas Mitchell
408 East Sherman Ave., Ste 316
Coeur d'Alene, ID 83814-2778

Glenna M. Christensen
MOFFATT THOMAS, BARRETT, ROCK
& FIELDS, CHTD.
P.O. Box 829
Boise, ID 83701-0829

X by U.S. mail
_____ by hand delivery
_____ by facsimile
_____ by overnight mail

Kenneth L. Mallea

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD, Claimant, v. HAGADONE CORPORATION, Employer, and ROYAL INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 15-000063** **DECLARATORY RULING** **FILED** **AUG 27 2003** INDUSTRIAL COMMISSION

INTRODUCTION

On December 14, 2001 the Commission issued its final ruling in Claimant's claim for benefits from the Hagadone Corporation and its two sureties, General Insurance Co. (General) and Royal Indemnity Company (Royal). The case consolidated Claimant's three workers' compensation claims. None of the parties joined the Industrial Special Indemnity Fund (ISIF). The Commission found, among other things, that Claimant was totally and permanently disabled pursuant to the odd-lot doctrine. In the final order, the Commission deemed Royal fully liable for the total permanent disability benefits. In particular the Commission found "the last accident

caused Claimant to suffer total and permanent disability." Order Regarding Reconsideration, p. 2. None of the parties appealed that decision. However, Royal subsequently filed a complaint against ISIF on May 22, 2002, seeking to apportion part of its liability for Claimant's total permanent disability benefits pursuant to Idaho Code § 72-332.

On October 11, 2002 ISIF requested a declaratory ruling, pursuant to Rule XV, JRP, that would prohibit Royal from pursuing ISIF liability. Ultimately, ISIF seeks a dismissal of the complaint filed by Royal. A number of legal issues are presented in this declaratory ruling as grounds for dismissal. They are as follows:

1. Whether the complaint against ISIF is barred by the doctrine of collateral estoppel.

2. Whether Royal waived its right to seek apportionment by failing to join ISIF in the previously mentioned decision.

3. Whether the Commission's previous decision bars Royal's complaint against ISIF pursuant to Idaho Code § 72-718.

4. Whether Royal is estopped from seeking apportionment from ISIF.

5. Whether ISIF's constitutional due process rights are violated if Royal's complaint is not dismissed.

6. Whether the complaint should be dismissed as a matter of law because Royal cannot establish the elements of ISIF liability under Idaho Code § 72-332.

The Commission held a hearing en banc on May 15, 2003. Kenneth Mallea represented ISIF. Glenna Christensen represented Royal. Claimant and his attorney, Thomas Mitchell, were present at the hearing. Claimant did not present any oral argument, but previously entered pleadings supporting the position of ISIF.

At hearing, Royal objected to Claimant's involvement on the grounds that Claimant was not a named party to the suit. Claimant is certainly an interested party to the proceedings. Moreover, both Royal and ISIF served copies of all the pleadings upon Claimant, as if he was a party. The objection by Royal, however, is sustained. Although Claimant is identified as a party to the Petition proceedings, his pecuniary interests are not actually affected by the outcome of the proceedings. At this point, Claimant may be a witness in any further proceedings between ISIF and Royal. Royal will compensate him for total permanent disability benefits, during the pendency of any further proceedings in this matter.

The primary argument relied upon by ISIF is collateral estoppel, or issue preclusion. ISIF contends that Royal's liability for total permanent disability benefits was fully and finally decided by the Commission's prior order on reconsideration, from which Royal did not appeal. Because Royal was deemed fully liable for the total permanent disability benefits, ISIF contends there are no remaining benefits to apportion against ISIF. Additionally, ISIF asserts the prior ruling is final and conclusive against Royal and cannot be relitigated. ISIF also maintains Royal waived its right to apportionment. Further, ISIF argues it would be placed in an unfair disadvantage if it were brought into litigation after the Commission previously found Claimant totally and permanently disabled and held Royal liable for such benefits. Finally, ISIF maintains that the facts do not establish its statutory liability.

Royal opposes the petition, arguing its complaint against ISIF merely seeks contribution in keeping with the intent of Idaho Code § 72-332. Royal maintains that the elements of ISIF liability under Idaho Code § 72-332, such as "combines with," were not previously litigated and therefore the prior total permanent disability finding should not preclude the issue from being

litigated for purposes of ISIF liability.

DISPOSITION OF REQUEST

The ruling of December 14, 2001 is clearly identified as the order and the subject of the petition. An actual controversy exists between Royal and ISIF concerning Royal's ability to pursue ISIF after the case was fully litigated between Claimant, Royal and another surety. A supporting memorandum setting forth the relevant facts and law accompanies ISIF's petition. Therefore, the Commission finds the requirements of Rule XV, JRP, are met, and a declaratory ruling is an appropriate determination of the applicable issues presented herein.

DECLARATORY RULING

This is a case of first impression. The parties have called for judicial guidance on the orderly development of a complicated workers' compensation claim involving an injured worker, his employer, two insurance companies, and ISIF. Fundamentally, the Commission must decide whether ISIF may be shielded from liability by a Commission determination in previous litigation between an injured worker and employer. Idaho law provides a special proceeding for a previously impaired worker who sustains a subsequent disability and by reason of the combined effects, the worker is rendered totally and permanently disabled. When the elements of Idaho Code § 72-332 are satisfied, ISIF is obligated to provide the injured worker lifetime benefits. The ISIF is funded by a levy, pursuant to Idaho Code § 72-327, in which all Idaho self-insured employers and sureties must pay a proportionate share of the indemnity benefits paid on Idaho workers' compensation claims during the applicable reporting period. Other than a sixty-day notice requirement under Idaho Code § 72-334, the Workers' Compensation Law in Idaho contains no statute of limitations on the timing of a complaint against ISIF. The purpose of ISIF

is to encourage employers to hire injured workers and to encourage workers with partial incapacitation to seek employment. Curtis v. Shoshone County Sheriff's Office, 102 Idaho 300, 304, 629 P.2d 696 (1981). Prior to its creation, an employer who hired a person with a partial disability was subject to the responsibility of paying for total permanent disability compensation to an employee rendered totally and permanently disabled because of his pre-existing condition coupled with a subsequent industrial injury. *See* McNeil v. Panhandle Lumber Co., 34 Idaho 773, 203 P. 1068 (1921). The fund was established to relieve an employer of this burden. The underlying policy of the fund is to allow an employer to hire a person with a pre-existing impairment or disability. The employer would then have a limited exposure should a subsequent industrial injury render the worker totally and permanently disabled. 1927 Idaho Sess. Laws, ch. 106, § 6234, p. 141; *recodified in* 1971 Idaho Sess. Laws, ch. 124, p. 447. As in Claimant's case, the fund also operates to encourage employers to retain workers who have been injured but remain capable of working.

1. Collateral Estoppel

Previously at issue before the Commission was the extent of Claimant's permanent disability, including whether Claimant was totally disabled. (Tr. p. 10, ls. 5-10). The Commission ultimately found Claimant permanently and totally disabled pursuant to the odd-lot doctrine, and declared Royal liable for the benefits. Order Regarding Reconsideration, December 14, 2001. The ruling was specifically framed in the context of the particular issues presented by the parties to the Commission. Royal did not request reconsideration or appeal the ruling. ISIF now asserts Royal is collaterally estopped from relitigating liability for total permanent disability benefits.

The Idaho Supreme Court has pronounced the elements necessary for the application of collateral estoppel. Each of the following questions must be answered in the affirmative in order for collateral estoppel to be applied:

1. Did the party against whom the earlier decision is asserted have a full and fair opportunity to litigate that issue in the earlier case?
2. Was the issue decided in the prior litigation identical with the one presented in the action in question?
3. Was the issue actually decided in the prior litigation?
4. Was there a final judgment on the merits?
5. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? Jackman v. Industrial Special Indemnity Fund, 129 Idaho 689, 692 (1997).

In this case, the pivotal element for collateral estoppel analysis is whether the issue was actually decided in the prior litigation. ISIF defines the issue common to both the previous decision and the potential claim against ISIF as "liability for Claimant's disability benefits." Memorandum in Support of Petition, p. 7. Although the interests of judicial economy make this description of the issues tempting, the Commission disagrees. The issues previously disputed between Claimant and Employer were not the same as the potential issues that would be litigated between ISIF and Royal, as explained below.

First, consider impairment. The previous case was a consolidation of three claims. The Commission rendered impairment ratings for Claimant's 1996, 1997, and 1999 industrial injuries. Impairment related to Claimant's 1997 motor vehicle accident was not rendered. The impairments were analyzed under Idaho Code §§ 72-422 and 424. In a case between Royal and ISIF under Idaho Code § 72-332, the fundamental impairment for which ISIF could be found liable must meet more than the definitional requirement of Idaho Code § 72-422. The impairment also must have been pre-existing at the time of the industrial accident, permanent,

and a hindrance to employment. *See* Toelcke v. State, Indust. Special Indem. Fund, 134 Idaho at 493, 5 P.3d 471, 473 (2000), *quoting* Dumaw v. J.L. Norton Logging, 118 Idaho 150, 154, 795 P.2d 312, 316 (1990); and *See* Quincy v. Quincy, 136 Idaho 1, 6, 27 P.3d 410, 415 (2001).

Next, we must consider disability. The Commission addressed the disability from each industrial injury separately and chronologically. The 1996 hernia rendered Claimant 20% permanently disabled, inclusive of 10% impairment. The 1997 low back injury resulted in no impairment disability. The 1999 low back injury resulted in 60% disability, inclusive of the 5% impairment. The Commission next declared Claimant totally and permanently disabled under the odd-lot doctrine. Without precedent for determining percentages of liability for employers where ISIF is not a party, the Commission deemed Royal fully liable for the total permanent disability benefits in the previous case. Order Denying Reconsideration, December 14, 2001, pp. 3-4. In a potential case against ISIF under Idaho Code § 72-332, the total and permanent disability must be the result of a combination of the pre-existing impairment described above and the subsequent industrial injury. Royal has acknowledged that the issue of total permanent disability may well have to be re-litigated. Employer's Memorandum, p. 7. Claimant bares no risk in such a process. His status with Royal is secure. If the Commission reaches an inconsistent ruling, the ruling would only be against Royal for apportionment purposes.

The conclusion that the issues in Royal's claim against ISIF are not collaterally estopped is consistent with Jackman, *supra*. Jackman involved a previous settlement with his employer for 33% impairment due to L6-S1 spondylolisthesis, right hip pain, and a total hip arthroplasty. Later, Jackman filed a claim against ISIF seeking to apportion the 33% whole person impairment into 13% pre-existing permanent physical impairment and 20% attributable to the industrial

accident. The Court, leery of a double recovery for the same impairment, held the claim against ISIF collaterally estopped because the issues were identical. Jackman had failed to present additional impairment for which the employer was not liable. In the case at hand, Royal is pursuing ISIF liability after the Commission pronounced Royal liable to Claimant. The risk of double recovery would not exist.

Our conclusion that collateral estoppel does not bar the issues against ISIF also comports with the guidance provided in a case decided by the Idaho Court of Appeals. In Robertson Supply, Inc. v. Nicholls, 131 Idaho 9, 952 P.2d 914 (1998), the Court found, among other things, the doctrine of collateral estoppel inapplicable. Robertson Supply sought to collect on a $12,000 debt. Robertson first received a default judgment against the corporate entity for the entire $12,000 debt[1]. However, the debt was virtually unrecoverable, so Robertson Supply subsequently sued Nicholls personally for $7,150 of the debt. The Court found collateral estoppel was not a bar to the claim. Although the claim arose from the same facts, the defendants were different, so the issues were deemed different enough to withstand a collateral estoppel defense. Quoting the Restatement (Second) of Judgments, the Court took note that:

> [t]he interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation. Robertson Supply, Inc., at 918.

Just as the issues and theories in the two Robertson Supply cases were different, the issues and theories in the two Stoddard cases are different. In Robertson Supply, the creditor

1 The numbers in Robertson Supply, Inc. have been rounded for ease of analysis.

sought full reimbursement on the debt in the first suit, and then the creditor sought partial reimbursement from another party who shared in the obligation for the debt. In Stoddard, Claimant first received full recovery on his workers' compensation claim in the suit against Employer, now Employer seeks ISIF's contributive share of the obligation. Like Robertson Supply, the potential for inconsistent rulings is not a prevailing concern where the issues have not actually been litigated.

Thus, the Commission finds the issues in Royal's complaint against ISIF are not barred by the doctrine of collateral estoppel.

2. Waiver

Waiver is a voluntary, intentional relinquishment of a known right. Brand S. Corporation v. King, 102 Idaho 731, 639 P.2d 429 (1981). There is no direct evidence that Royal intentionally relinquished its right to pursue ISIF liability by not joining ISIF in the previous case. Although Royal knew Claimant alleged he was totally and permanently disabled, there is no statutory language in the workers' compensation law requiring ISIF to be joined into an original cause of action. The right to pursue ISIF liability, as it is written in Idaho Code § 72-332, does not expire at any given point in the process of litigation. For example, Claimants often settle their cases with employers and then seek ISIF liability. *See* Jackman *supra*, Tagg v. State Industrial Special Indemnity Fund, 123 Idaho 95, 844 P.2d 1345 (1993), and Sines v. Appel, 103 Idaho 9, 644 P.2d 331 (1982). Therefore, the Commission finds Royal did not waive its right to pursue ISIF liability. As expressed by the Commission in its prior decision between Claimant and Employer, the law is silent on how to apportion the liability of an employer in total permanent disability cases with facts indicating pre-existing physical impairment.

3. Idaho Code § 72-718

"Idaho Code § 72-718 is a departure from 'pure res judicata' and operates to make Industrial Commission decisions final and conclusive ***only*** as to matters ***actually considered and adjudicated*** by the Commission." (*Emphasis added.*) Tagg, *supra* at 98, 1348. Res judicata, ". . . may not apply unless both individuals were party to a previous judgment . . . ." Brown v. State of Idaho, Industrial Special Indemnity Fund, Idaho Supreme Court Opinion No. 23, p. 3. (2003). Royal was a party to the previous judgment, but ISIF was not. Therefore, the Commission finds Idaho Code § 72-718 does not bar Royal's complaint against ISIF. *See* Sines v. Appel, 103 Idaho 9, 644 P.2d 331 (1982).

4. Quasi-Estoppel

The doctrine of quasi-estoppel may be invoked against a person asserting a right inconsistent with a position previously taken by him, with knowledge of the facts and his rights, to the detriment of the person seeking to apply the doctrine. Young v. Idaho Department of Law Enforcement (Alcohol Beverage Control Division), 123 Idaho 870, 875, 853 P.2d 615, 620 (1993), *citing* Evans v. Tax Comm'n, 97 Idaho 148, 540 P.2d 810 (1975); Treasure Valley Bank v. Butcher, 121 Idaho 531, 826 P.2d 492 (Ct. App. 1992).

Royal previously asserted Claimant was not entitled to disability beyond impairment. Royal did not prevail in that regard. Now, in asserting ISIF liability, Royal must argue that Claimant is totally and permanently disabled. These positions are inconsistent. Royal was aware of the facts strongly implicating ISIF's involvement in the case during the prior litigation. Total permanent disability had been a noticed issue. Royal's right to pursue ISIF liability was known by Royal at the time of the previous litigation. However, the Commission finds no indication

that it would be detrimental to ISIF to allow Royal to pursue ISIF's liability at this point. ISIF faces no re-litigation expense because it was not a party to the prior litigation. Royal must shoulder the burden of double litigation. The question of total permanent disability for purposes of Idaho Code § 72-332 would be undetermined between Royal and ISIF. The only ghosts from the Commission's previous determinations which could come up to haunt ISIF would be the previous PPI ratings for the 1996, 1997, and 1999 industrial accidents. However, this has been proclaimed appropriate by the Idaho Supreme Court. *See* Quincy, *supra*; and Smith v. J.B. Parson Co., 127 Idaho 937, 908 P.2d 1244 (1996). Therefore, the Commission finds ISIF has not presented a factual basis to dismiss Royal's claim against ISIF under the theory of quasi-estoppel.

5. Due Process

State and federal due process requires adequate notice and a meaningful opportunity to be heard on an issue that affects a party's property interests. Bradbury v. Idaho Judicial Council, 136 Idaho 63, 28 P.3d 1006 (2001). The Commission finds ISIF's argument for violation of due process is unpersuasive. The elements of Idaho Code § 72-332 were not addressed in the prior Commission decision, and ISIF was not declared liable. Those issues would be addressed anew, after notice and a meaningful opportunity to be heard, in Royal's claim against ISIF. The Commission finds ISIF's due process rights are not offended by the complaint and pending litigation between Royal and ISIF.

6. Elements of ISIF Liability

Since no facts have been developed in this proceeding, the elements of ISIF liability under Idaho Code § 72-332 are more appropriate for an administrative hearing. These issues will be more fully explored by the parties in such a hearing. The Commission, therefore, declines to

rule on this aspect of ISIF's request. Rule XV, (F)(4)(e), JRP.

CONCLUSION

The Commission has concluded the legal theories of collateral estoppel, waiver, Idaho Code § 72-718, quasi estoppel, and due process are not a bar to Royal's complaint against ISIF. Although in hindsight the interests of judicial economy may have beckoned for the joinder of ISIF in the original cause of action between Claimant, and his employer and the two sureties, the law does not require it. The ISIF is funded by a levy from employers/sureties and there is no statute of limitations in Idaho Code § 72-332 for claims against ISIF. Workers and employers benefit from the ISIF. Its purpose would be thwarted if a claim against ISIF were not permitted.

IT IS SO ORDERED.

DATED this 27 day of August, 2003.

INDUSTRIAL COMMISSION

R. D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

James F. Kile, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of August 2003 a true and correct copy of **Declaratory Ruling** was served by regular United States mail upon each of the following:

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680-0857

A courtesy copy was sent to:

JOHN T MITCHELL
408 E SHERMAN AVE STE 316
COEUR D'ALENE ID 83814-2778

sdn/cjh